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No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

—o—

SEQUOIA BOOKS, INC.,
a corporation,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

—o—

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QUESTIONS PRESENTED

1. Whether a search warrant document, which resulted in the seizure of 139 different magazines, is constitutionally sufficient where probable cause for obscenity is tied to the depiction of a single sexual act.

2. Whether a prior adversary hearing is constitutionally required when a search warrant authorizes the confiscation of an unlimited number of magazines, which are purportedly obscene because they contain a depiction of a single sexual act.

3. Whether a search warrant which predetermined obscenity and authorized executing officers to take any magazine that contained a depiction of a single sexual act is a constitutionally invalid general warrant.

TABLE OF CONTENTS

Pages

SUBJECT INDEX

Questions Presented i
Table of Contents ii
Table of Authorities iii
Opinion Below 2
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 3
Reason for Granting the Writ 5
Conclusion 8

APPENDIX INDEX

Exhibit A—Opinion of the Second District Appellate Court ..... App. 1
Exhibit B—Order Denying Petition for Leave to Appeal to Illinois Supreme Court ..... App. 9
Exhibit C—Order of Illinois Supreme Court Staying Mandate ..... App. 10
Exhibit D—First, Fourth and Fourteenth Amendments to the Constitution of the United States ..... App. 12
Exhibit E—Illinois Obscenity Statute, Ch. 38, § 11-20 ..... App. 13
Exhibit F—Complaint, Affidavit and Search Warrant ..... App. 16

TABLE OF AUTHORITIES

Pages

Cases

A Quantity of Copies of Books v. State of Kansas, 378 U.S. 205 (1964) 5, 6, 7

Heller v. New York, 413 U.S. 483 (1973) 6

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) 6

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) 5, 6, 7

Marcus v. Search Warrants of Property, 367 U.S. 717 (1961) 5, 6, 7

Maryland v. Macon, — U.S. —, 105 S.Ct. 2778 (1985) 6

New York v. P.J. Video, — U.S. —, 106 S.Ct. 1610 (1986) 5, 6

People v. Sequoia, Inc., 145 Ill.App.3d 1054, 495 N.E.2d 1292 (1986) 4, 5

Roaden v. Kentucky, 413 U.S. 496 (1973) 6

Stanford v. Texas, 279 U.S. 476 (1965) 5

United States v. Guarino, 729 F.2d 864 (1st Cir. 1984) 8

United States v. Tupler, 564 F.2d 1294 (9th Cir. 1977) 8

Statutes and Constitutional Provisions

Illinois Obscenity Statute, Ch. 38, § 11-20 ..... 2, 3

United States Constitution, First Amendment 2, 5, 6, 8

United States Constitution, Fourth Amendment 2, 8

United States Constitution, Fourteenth Amendment 2, 8

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In The

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SEQUOIA BOOKS, INC.,
a corporation,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

—o—

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on December 1, 1986.

—o—

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at — Ill.App.3d —, — N.E.2d — (1986). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Appellate Court for the Second District.

A written opinion was issued by the Appellate Court on December 1, 1986, and rehearing was not sought by petitioner. The petitioner sought leave to appeal to the Illinois Supreme Court, and on April 15, 1987, its petition was denied. A copy of the order denying leave to appeal is included in the appendix as Exhibit B. Petitioner filed an affidavit of intent to seek review in the United States Supreme Court, and a motion to stay the mandate, and on April 23, 1987, its motion was granted. A copy of the order staying the mandate is included in the appendix as Exhibit C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth, and Fourteenth Amendments, and the Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev.Stat. (1985) are included in the appendix as Exhibits D and E.

STATEMENT OF THE CASE

The petitioner is Sequoia Books, Inc., the corporate owner and operator of the Denmark Bookstore, an adult bookstore located at 1300 Business 30 West, Aurora, Illinois. The bookstore restricts attendance to adults over the age of 18 years. The criminal charge that underlies this case against petitioner involves the offense of sale of alleged obscene magazines, a violation of Ch. 38, § 11-20, Ill.Rev.Stat.

On October 23 and 24, 1984, Ronald Henson, an Oswego Village Police Officer, entered the Denmark Bookstore. He browsed through magazines available at the store and purchased two entitled "Here's the Beef" and "Student Bodies" on October 23, 1984. He returned on the 24th and purchased "Two Way Swingers".

On October 25, 1984, a complaint and affidavit for a search warrant was executed by Henson before Associate Circuit Judge Richard Larson. Judge Larson reviewed the three magazines that had been purchased. A search warrant was issued, commanding the search of the Denmark Bookstore and the seizure of:

> Magazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, or anal insertion of prosthetic devices, insertion of tongue into anus and anilingus.

Copies of the complaint, affidavit, and search warrant are included in the appendix as Exhibit F.

Kendall County State's Attorney investigators executed the search warrant on October 26, 1984, and in the course of 90 minutes the officers reviewed several hundred magazines to determine if the described acts from

the warrant were within it. In all, 139 separate magazines were eventually seized, with each review of an individual magazine not exceeding one minute.

On November 21, 1984, a two-count criminal complaint was filed in Kendall County Circuit Court, charging the defendant Sequoia Books with obscenity. Under a subsequent amended complaint, a single charge was made under one count with respect to the 139 magazines.

Prior to trial, petitioner filed a motion to quash search warrant, suppress items seized and order return, asserting the procedural defects of the search and seizure process. The petitioner asserted the warrant lacked specificity and was overbroad, thus constititing a general warrant. In addition, the petitioner contended there was no searching focus on the alleged obscenity of the two magazines, and that the procedure was designed to suppress all sexually explicit material and close the store, thus imposing an invalid prior restraint. The trial court denied the motion to suppress.

After a jury trial, the petitioner was found guilty of the offense of obscenity. A post-trial motion was filed, preserving the constitutional issues on the search and seizure procedure.

Petitioner appealed to the Second District Appellate Court for the State of Illinois, and on December 1, 1986, the court affirmed the judgment of the trial court.

The appellate court upheld the search and seizure issue as proper on the basis of its prior holding in *People v. Sequoia, Inc.*, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (1986) where an identical procedure was endorsed. In

the prior *Sequoia* case, the court relied on *New York v. P. J. Video*, — U.S. —, 106 S.Ct. 1610 (1986), and held *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), as factually distinguishable. The court had also concluded in its prior decision that the warrant was not general and allowed for seizure of times of specific sexual conduct likely to meet the three-prong obscenity test.

The petitioner sought timely leave to appeal in the case. On April 15, 1987, its petition was denied by the Illinois Supreme Court, but the mandate of that Court was stayed pending review by this Court.

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REASON FOR GRANTING THE WRIT

I.

THE SEARCH WARRANT PROCEDURE UTILIZED IN THIS CASE WAS CONSTITUTIONALLY INVALID BECAUSE IT CONSTITUTED A GENERAL WARRANT, THERE WAS NO SEARCHING FOCUS ON THE ISSUE OF THE OBSCENITY OF THE MAGAZINES TO BE SEIZED, AND THE SEIZURE AMOUNTED TO A PRIOR RESTRAINT.

This case presents egregious factual circumstances where police officers conducted a massive search and seizure that imposed a system of prior restraint on the petitioner's bookstore. For the past 25 years, this Court has condemned large scale search and seizure operations, where First Amendment interests of liberty of expression are involved. *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961); *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964); *Stanford v. Texas*,

279 U.S. 476 (1965); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636, 637 (1968); *Heller v. New York,* 413 U.S. 483, 491 (1973); *Roaden v. Kentucky,* 413 U.S. 496, 501 (1973). This Court has only recently reaffirmed these fundamental constitutional principles. *See Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979) and *Maryland v. Macon,* — U.S. —, 105 S.Ct. 2778 (1985).

Most recently, in *New York v. P.J. Video,* — U.S. —, 106 S.Ct. 1610, 1614 (1986), the Court reiterated the long-standing concern and requirement of special conditions on seizures involving First Amendment implications. In *P.J. Video,* the Court was addressing the standard of probable cause for issuance of a warrant involving seizure of materials presumptively protected by the First Amendment. In reversing the New York Court of Appeals decision, this Court held that prior decisions did not dictate a higher standard in making a probable cause determination. Rather, as set forth in *Heller v. New York,* the requirement was that probable cause must be determined to safeguard First Amendment interests, and that the protection enunciated in cases such as *Roaden, A Quantity of Books, Heller, Marcus* and *Lee Art Theatre* were adequate to ensure there is no impairment of the First Amendment interests.

In accordance with the requirements of *Marcus, Quantity,* and *Lee Art Theatre,* the Court determined that the affidavit provided a factual basis to focus solely on the issue of obscenity, utilizing a standard of probable cause.

In the present case, none of the fundamental constitutional requirements pronounced by this Court in *Marcus* and its progeny have been met. The search warrant

documents failed to establish probable cause that materials to be seized were obscene. The issuing judge was not examining the materials to be seized and instead issued a general warrant which left to the discretion of the executing officers what items and what quantity was to be seized. In short, there was no searching focus on the concept of obscenity and the search warrant procedure was patently unconstitutional. The judge was acting on an absence of information on any of the magazines that were ultimately seized. The presence of depictions of sexual conduct alone cannot satisfy all three elements of the test for obscenity.

Perhaps the most glaring constitutional deprivation to petitioner under the circumstances surrounding this search and seizure procedure is the clear imposition of a system of prior restraint. Under the general warrant issued, and with the discretion left to the police officers executing the warrant, the issuing judge could not have predicted in any manner the extent of the seizure that would ultimately be accomplished. It is obvious the focus of the entire procedure was to economically damage the bookstore operation. Under the facts of the case, where 139 magazines are initially seized, with only three ultimately being the subject of a trial, an evidence-gathering claim cannot be advanced as a counter-argument to a prior restraint analysis. The holdings of *Marcus*, *Quantity*, and *Lo-Ji Sales*, require that an adversary hearing precede the issuance of the warrant and the seizure that results. There is sound historical and constitutional disapproval for such procedures directed at instilling the type of economic disruption intended by the State in the instant case.

Petitioner submits that the holding of the appellate court in this case ignores the historical condemnation of general warrants and search and seizure procedures with First Amendment implications. The appellate court's holding cannot be squared with fundamental constitutional principles enunciated by this Court in a long line of cases. The analysis of application of those principles submitted by petitioner has been accepted by two circuits, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984), and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977), which therefore are in conflict with the decision of the Illinois Appellate Court for the Second District. This Court should acknowledge the significance of the constitutional issues presented by this case and should grant certiorari.

———o———

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, because of the significant issue presented under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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EXHIBIT A

No. 2-85-0985

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Circuit Court for) the 16th Judicial
Plaintiff-Appellee,	) Circuit, Kendall) County, Illinois.
v.	)
SEQUOIA BOOKS, INC.,	) Publ. In Full) Honorable) Wilson Burnell,
Defendant-Appellant.	) Judge Presiding.

(Filed December 1, 1986)

JUSTICE UNVERZAGT delivered the opinion of the court:

The defendant, Sequoia Books, Inc., appeals from the judgment of the circuit court of Kendall County entered on a jury verdict finding it guilty of obscenity. (Ill. Rev. Stat. 1983, ch. 38, par. 11-20(a)(1).) It appeals, raising five issues which we find have been addressed and decided in several recent opinions of this court.

On October 23 and 24, 1984, Ronald Henson, an Oswego village police officer, went to the Denmark Bookstore at 1300 Business 30, Aurora, Kendall County, Illinois. He purchased two magazines entitled "Here's the Beef" and "Student Bodies" on October 23, and one on October 24 entitled, "Two-Way Swingers."

On October 25, 1984, Henson executed a complaint and affidavit for a search warrant. The court additionally received the three magazines that Henson had purchased, and it reviewed them. The court then issued a search warrant, commanding the search of the Denmark Bookstore and the seizure of:

> "Magazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, vaginal or anal insertion of prosthethic [*sic*] devices, insertion of tongue into anus and anilingus."

The warrant was executed on October 26, 1984, by Kendall State's Attorney investigators, supervised by Joel Widell. For approximately one and one-half hours, those investigators reviewed the several hundred magazines on bookracks located around the sales area of the store to determine if either on the cover or inside of a magazine there was at least one photographic depiction of a sexual act which met the criteria set forth in the search warrant. The officers took only one copy of any single magazine; a total of 139 separate magazines were seized out of approximately 150 magazines reviewed. An amended single-count complaint was filed charging the defendant with obscenity with respect to the 139 magazines.

Sequoia's motion to dismiss was denied, as was its motion to quash the search warrant and suppress items seized after an evidentiary hearing and argument.

At trial, Kendall County State's Attorney investigator Joel Widell was the State's only witness in its case in chief. He described the bookstore premises and identified photographs taken on October 25, 1984. He identified the 139 magazines taken from the bookstore on that date, they were

admitted in evidence and shown to the jury. Before it rested, the State presented a stipulation of the parties that Sequoia Books, Inc., owned and operated the Denmark Bookstore and offered the 139 magazines on trial for sale on October 25, 1984, knowing the nature or content of the magazines. The defendant's motion for a directed verdict at the close the State's case in chief was denied.

The first defense witness was Roderick Bell, a social scientist specializing in public opinion polls. He testified concerning a poll conducted in 1983 which was designed to report the attitude of adults living within the State of Illinois concerning the dissemination of sexually explicit materials. Dr. Bell gave the foundation and background for the conducting of such a survey, including his assessment that the survey was a valid measure of community attitudes, and read to the jury the results of the poll, which included a percentage breakdown of adult responses.

The next witness for the defendant was Kevin Kropp, a student at the University of Illinois, who testified that he went to various adult bookstores and communities throughout the State of Illinois. He identified photographs of each of the bookstore locations, as well as magazines that he had purchased there which were comparable to the level of sexual explicitness of the magazines on trial.

The final witness for the defendant was Dr. Carl Hamann, a psychiatrist from Rockford, Illinois. He testified he examined all of the materials on trial and, in his opinion, those materials, taken as a whole, did not appeal to the prurient interest of the average adult. It was also his opinion that the magazines could be used for the treatment of sexual degeneracy, as teaching instruments in medi-

cal schools, and that they otherwise would have informative value about sex. His opinion was based upon the President's Commission Report on Obscenity and Pornography, available medical literature through 1985, and his background and experience.

The defendant made an offer of proof, seeking admission of adult use ordinances from various Illinois communities (Springfield, Quincy, Danville, Peoria, Urbana, and Chicago). It was asserted that such ordinances were relevant to showing the degree of public acceptance of sexually explicit material in the State of Illinois. The State's objection on the basis of relevancy was sustained, and admission of the evidence was refused.

In rebuttal, the State called a clinical psychologist, Dr. Michael Chiappetta. He testified that in his opinion the magazines appealed to the prurient interest and were utterly without redeeming social value. He further testified that the magazines could be harmful to some adults, and that the President's Commission Report had been rejected by Congress.

The trial court conducted an independent judicial review of the 139 magazines, and it determined that all of them should be submitted to the jury for deliberation and decision. The defendant's motion for directed verdict at the close of all the evidence was denied.

After argument and deliberation, the jury returned a general verdict of guilty against the defendant for the offense of obscenity, and completed a special interrogatory finding each of the 139 magazines to be obscene. The defendant was fined $910 and ordered to pay costs.

Defendant first argues that the facts before the issuing judge were insufficient to establish probable cause for the search warrant, and that the warrant was defective because it did not sufficiently particularize the items to be seized. Defendant concedes, however, that these issues are "similar, if not identical" to the ones addressed in this court's recent opinion in *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, 1059-63. It submits, though, that *Sequoia* was "ill-considered and in error" and urges without any specific argument that *Sequoia* should not be adjudged controlling in this case. We note defendant's petition for rehearing in that case was denied, however, and that on Sequoia's motion, our mandate was recalled pending the filing and disposition of its petition for leave to appeal to the Supreme Court of Illinois.

The type of facts presented to the issuing judge in *Sequoia* and the search warrant issued there were similar to those presented here, to-wit: a complaint for search warrant of the subject premises supported by affidavit that the affiant had browsed through magazines in the bookstore and purchased two magazines on one day and one on the next day. The affidavit named the magazines and described in detail the depictions contained therein. Based on the affidavit and the court's own review of the three magazines, a search warrant was issued directing the seizure of magazines containing the depictions noted previously here.

Pending the Illinois Supreme Court's grant or denial of Sequoia's petition for leave, we find *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, was thoughtfully considered, based on sound precedent and controlling here.

Sequoia had conceded there that our *People v. Patroff* (1986), 141 Ill. App. 3d 483, was dispositive of the probable cause issue. Moreover, and although Sequoia argued against it, we found *Sequoia Books, Inc. v. McDonald* (7th Cir. 1984), 725 F.2d 1091, factually similar and pursuasively reasoned in upholding the warrant as against Sequoia's claim it should have been quashed as being a general warrant. We note *certiorari* was denied in that case. (*Sequoia Books, Inc. v. McDonald* (7th Cir. 1984), 725 F.2d 1091, *cert. denied* (1984), — U.S. —, 83 L. Ed. 2d 31, 105 S. Ct. 83.) Accordingly, we find the search warrant issued here was constitutionally sufficient.

Defendant next argues that the Illinois obscenity statute (Ill. Rev. Stat. 1983, ch. 38, par. 11-20) is unconstitutionally vague and overly broad and should be scrutinized in light of the recent United States Supreme Court decision in *Brockett v. Spokane Arcades, Inc.* (1985), 472 U.S. —, 86 L. Ed. 2d 394, 105 S. Ct. 2794. The State points out, however, and we agree, that this same contention was examined and the statute upheld as constitutional in our recent decision, *People v. Patroff* (1986), 141 Ill. App. 3d 483, 491-92. This same contention was also raised by Sequoia in two subsequent cases, *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, 1066, and *People v. Sequoia Books, Inc.* (1986), 146 Ill. App. 3d 1, 5. In each case, the statute was found to be constitutional, and we find those cases controlling here.

Defendant next contends it was error for the court to refuse the admission into evidence of adult use ordinances for six different communities throughout Illinois, arguing that such ordinances were evidence of the degree of public

acceptance of sexually explicit material. This same contention was examined and rejected in *People v. Sequoia Books, Inc.* (1986), 146 Ill. App. 3d 1, 4, and we find that decision controlling here.

Defendant next contends it was error for the court to give the following instruction to the jury:

> "In determining whether a magazine is obscene applying contemporary community standards you may consider the material in light of your collective observations in life in the State of Illinois, but you must not judge it by you own personal standards even if you are personally offended by the material."

Sequoia argues this instruction allowed the jury to make its determination of the State-wide community standard on a improper basis.

We note this same instruction was given to the juries in the cases *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, and *People v. Sequoia Books, Inc.* (1986), 146 Ill. App. 3d 1. In the former case, we found the phrase "you may consider the material in light of your collective observations in life" was repetitive of Illinois Pattern Jury Instruction, Criminal, No. 1.01[10] (2d ed. 1981), and unnecessary, but that it was not misleading so as to cause harm. Our second *Sequoia* decision found the first *Sequoia* case controlling. Defendant has presented no new argument as to this issue which would persuade us to alter our opinion in the case at bar, and we find no reversible error in the court's instruction to the jury.

Defendant's final contention is that it was not proved guilty beyond a reasonable doubt of obscenity where the State failed to rebut its survey evidence indicating the

acceptability of "comparable materials" throughout the State. Defendant contends that in light of this evidence, the State was required "to do more" to sustain a conviction than introduce the allegedly obscene magazines into evidence.

The State posits, however, and we agree, that greater acceptance of "sexually explicit" materials by the public does not indicate greater acceptance of obscene material; *i.e.*, material which (1) taken as a whole, appeals to a prurient interest in sex; (2) is patently offensive because it affronts contemporary community standards relating to the description, or representation of sexual matters; and (3) is utterly without redeeming social value. *People v. Ridens* (1974), 59 Ill. 2d 362.

Moreover, this same argument has been addressed and rejected in *People v. Pope* (1985), 138 Ill. App. 3d 726, and *People v. Hall* (1986), 143 Ill. App. 3d 766. See also *People v. Sequoia Books, Inc.* (1986), 146 Ill. App. 3d 1.

For the reasons expressed above, the judgment of the circuit court of Kendall County is affirmed.

JUDGMENT AFFIRMED.

LINDBERG and REINHARD, JJ., concur.

EXHIBIT B

64639

ILLINOIS SUPREME COURT
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April 15, 1987

Mr. J. Steven Beckett
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No. 64639—People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on May 7, 1987.

EXHIBIT C

GENERAL NO. 64639
IN THE SUPREME COURT
OF THE
STATE OF ILLINOIS

	) Appeal from the
	) Appellate Court
PEOPLE OF THE	) of the Second
STATE OF ILLINOIS,	) District
	) No. 2-85-985
Plaintiff-Appellee-	)
Respondent,	) From the Circuit
	) Court of the 16th
vs.	) Judicial Circuit,
	) Kendall County,
SEQUOIA BOOKS, INC.,	) Illinois
	) Trial Court
Defendant-Appellant-	) No. 84-CM-295
Petitioner.	)
	) Honorable
	) Wilson Burnell,
	) Judge Presiding

ORDER

(Filed April 23, 1987)

THIS MATTER coming on for consideration on the motion of petitioner to stay the mandate of this court pending an application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this court in the above cause is stayed pending the filing of an application for *certiorari* or the expiration of the period within which said application may be filed. If *certiorari* is applied

for, and mandate of this court shall, upon proof of such filing being made by affidavit filed with the clerk of this court, be further stayed pending resolution by the United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which *certiorari* may be sought.

/s/ Thomas Moran
Justice, Supreme Court of Illinois

EXHIBIT D

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT E

Illinois Obscenity Statute
Ill.Rev.Stat. (1983) ch. 38, § 11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participate directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertise or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, education or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT F

COMPLAINT FOR SEARCH WARRANT
(Filed October 26, 1984)

Ronald Henson, Complainant, being first duly sworn on oath, now appears before the undersigned Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, and requests the issuance of a Search Warrant to search the person or place as follows: Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein and seize the instruments, articles or things which have been used in the commission of, of which constitute evidence of, the offense of OBSCENITY in violation of Chapter 38, Section 11-20, Illinois Revised Statutes. Said instruments, articles or things being described as follows: Magazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus and anilingus.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and/or place set forth above:

See attached affidavit of Ronald Hensen adopted and incorporated herein.

Subscribed and sworn to before me,
this 25th day of October, 1984

/s/ Ronald T. Hensen
Complainant

R. L. Larson

84-MR-28

EXHIBIT "A"

The demised premises shall consist of the two South buildings, and more specifically 224 Feet of frontage, as measured along U.S. Rt. #30 upon the following described premises:

That part of the South half of the Northeast quarter of Section 12, Township 37 North, Range 8 East of the Third Principal Meridian, described as follows: Commencing at the point of intersection of the North line of the South half of said Northeast quarter with the Southwesterly line of the right of way of the Elgin, Joliet and Eastern Railroad Company; thence Southeasterly along said Southwesterly right of way line 318.56 feet for the point of beginning; thence Southwesterly at right angles to the last described course 50 feet; thence Southeasterly parallel with said Southwestern right of way line 130 feet; thence Northeasterly at right angles to the last described course 50 feet to said Southwesterly right of way line; thence Northwesterly along said Southwesterly right of way line 130 feet to the point of beginning; in the Township of Oswego, Kendall County, Illinois.

PARCEL ONE:

That part of the South half of the Northeast quarter of Section 12, Township 37 North, Range 8 East of the Third Principal Meridian, described as follows: Commencing at the point of intersection of the North line of the South half of said Northeast quarter with the Southwesterly line of the right of way of the Elgin, Joliet and Eastern Railroad Company; thence Southeasterly along said Southwesterly right of way line 134.28 feet of the point of beginning; thence Southwesterly at right angles to the last described course 50 feet; thence Southeasterly parallel with said Southwesterly right of way line, 84.28 feet; thence Northeasterly at right angles to the last described course 50

feet to said Southwesterly right of way line; thence Northwesterly along said Southwesterly right of way line 84.28 feet to the point of beginning; in the Township of Oswego, Kendall County, Illinois.

PARCEL TWO:

That part of the South half of the Northeast quarter of Section 12, Township 37 North, Range 8 East of the Third Principal Meridian, described as follows: Commencing at the point of intersection of the North line of the South half of said Northeast quarter with the Southwesterly line of the right of way of the Elgin, Joliet and Eastern Railroad Company; thence Southeasterly along said Southwesterly right of way line 218.56 feet for the point of beginning; thence Southwesterly at right angles to the last described course 50 feet; thence Southeasterly parallel with said Southwesterly right of way line

* * *

STATE OF ILLINOIS)
) SS
COUNTY OF KENDALL)

84-MR-28

AFFIDAVIT

Ronald Henson being first duly sworn on oath deposes and says as follows:

1. That this affiant is a special investigator for the Kendall County State's Attorneys Office.

2. That this affiant is familiar with a business being conducted on 1300 Business 30, Aurora, Oswego Township, Kendall County, Illinois, known as Denmark Bookstore and situated on the following described premises: See attached Exhibit "A".

3. That this affiant entered the Denmark Bookstore on October 23rd, 1984 and I purchased two magazines, namely "Here's the Beef" and "Students Bodies" which had depictions of the following:

a. magazines entitled "Here's the Beef" depicted fellatio, anal intercourse, insertion of prosthetic device into anus, excretion of semen onto buttocks of male;

b. magazines entitled "Student Bodies" depicted fellatio, anal intercourse, excretion of semen onto chest of male, anilingus.

4. That this official entered Denmark Bookstore on October 24th 1984 and purchased a magazine "Two-Way Swingers" which contain fellatio, cunnilingus, excretion of semen on tongue of male and female subjects, anilingus and anal intercourse.

5. That all of the magazines above described were offered for sale to the public on October 23rd, 1984 and October 24th, 1984.

/s/ Ronald E. Henson

Subscribed and sworn to before me
this 25th day of October, 1984.
/s/ R. L. Larson
Judge.

STATE OF ILLINOIS)
) SS
COUNTY OF KENDALL)

IN THE CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT, KENDALL COUNTY, ILLINOIS

84-MR-28

The People of the State of Illinois to all Peace Officers of the State of Illinois.

SEARCH WARRANT

(Filed October 26, 1984)

On this day, Ronald Henson, Complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that the following person or place: Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein be searched and the following instruments, articles or things which have been used in the commission of, or which constitute evidence of the offense of OBSCENITY in violation of Chapter 38, Section 11-20, Illinois Revised Statutes, BE SEIZED THEREFROM, NAMELY: Magazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, vaginal or anal insertion of prosthethic devices, insertion of tongue into anus and anilingus.

I further command that a return and inventory of anything so seized shall be made without unnecessary de-

lay before me or before any Court of competent jurisdiction.

/s/ R. L. Larson
Judge.

Time and date of issuance 10/25/84 @ 9:02 a.m.

Supreme Court, U.S.
FILED
AUG 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SEQUOIA BOOKS, INC.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether petitioner stated a question worthy of review by this Court.

A. Whether the circumstances surrounding the search warrant merit intervention by this Court.

B. Whether there is any conflict between the First and Ninth Circuits and the Illinois Appellate Court.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE WRIT:	
PETITIONER DOES NOT STATE A QUESTION WORTHY OF REVIEW BY THIS COURT	1
A. The Circumstances Surrounding The Search Warrant Do Not Merit Intervention By This Court	1
B. There Is No Conflict Between The First And Ninth Circuits And The Illinois Appellate Court	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	PAGE
A Quantity of Books v. Kansas, 378 U.S. 205 (1964)	4
Board of Directors of Rotary International v. Rotary Club of Duarte, 107 S.Ct. 1940 (1987)	3, 4
Heller v. New York, 413 U.S. 483 (1973)	4
Illinois v. Gates, 462 U.S. 213 (1983)	2, 3
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)	5
Marcus v. Search Warrant, 367 U.S. 717 (1961)	2, 4, 5, 6
Marron v. United States, 275 U.S. 192 (1927)	5, 6
Maryland v. Macon, 472 U.S. 463 (1985)	5
Miller v. California, 413 U.S. 15 (1973)	7
New York v. P.J. Video, Inc., ___ U.S. ___, 106 S.Ct. 1610 (1986)	2, 3, 7, 8
People v. Patroff, 141 Ill. App. 3d 483, 490 N.E. 2d 148 (2nd Dist. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 251 (1987), *U.S. appeal filed*	3
People v. Sequoia Books, Inc., 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987)	2, 3, 8, 9
People v. Sequoia Books, Inc., 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987)	2

People v. Sequoia Books, Inc., 150 Ill. App. 3d 211, 501 N.E.2d 856 (2nd Dist. 1986) 3, 5

Sequoia Books, Inc. v. McDonald, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984) 2

Stanford v. Texas, 379 U.S. 476 (1965) 2, 5, 6

Street v. New York, 394 U.S. 576 (1969) 3

United States v. Diamond, 808 F.2d 922 (1st Cir. 1987) 8

United States v. Guarino, 729 F.2d 864 (1st Cir. 1984) 8

United States v. Hale, 784 F.2d 1465 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 110 (1987) 8

United States v. McQuisten, 795 F.2d 858 (9th Cir. 1986) 8

United States v. Smith, 795 F.2d 841 (9th Cir. 1986), *U.S. appeal filed* 8

United States v. Tupler, 564 F.2d 1294 (9th Cir. 1977) 8

United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) 8

Webb v. Webb, 451 U.S. 493 (1981) 4

No. 86-1987

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v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

PETITIONER DOES NOT STATE A QUESTION WORTHY OF REVIEW BY THIS COURT

A. The Circumstances Surrounding The Search Warrant Do Not Merit Intervention By This Court.

Petitioner seeks review of the decision of the Illinois Appellate Court on the grounds that that decision was erroneous and improper. Petitioner's three reasons for this alleged error relate to the issuance of the search warrant: 1) the issuing judge improperly determined probable cause,

2) an adversary hearing prior to seizure should have been granted because the seizure under this warrant, which did not limit the number of magazines to be confiscated, constituted prior restraint, 3) the search warrant was overly broad, constituting a constitutionally invalid general warrant.

These issues do not call for the attention of this Court because this Court has clearly and conclusively formulated the relevant aspects of the search and seizure and obscenity doctrines. Regarding the probable cause and prior restraint issues, this Court recently reiterated the relevant aspects of the two doctrines in *New York v. P.J. Video, Inc.*, ____ U.S. ____, 106 S.Ct. 1610 (1986). *P.J. Video* and the case law it follows fully address and are fully dispositive of these two issues. Also, this Court has developed case law fully controlling the general warrant issue through a line of cases beginning with *Marcus v. Search Warrant*, 367 U.S. 717 (1961) and *Stanford v. Texas*, 379 U.S. 476 (1965). Therefore, the granting of this petition would not serve to develop, clarify, or modify the already well-established law in this area. This Court thought it proper to deny certiorari when this petitioner raised these same issues on three recent occasions. *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984); *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987); *People v. Sequoia Books, Inc.*, 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987).

In *P.J. Video* in its discussion of the proper probable cause standard, this Court stated that

> That standard was recently set forth by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983) . . . "The task of the issuing magistrate is simply to make a

> practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place . . . *Id.*, at 235, 238-239. . . . probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." 462 U.S., at 244, n. 13.

106 S.Ct. 1610, at 1615, 1616. In the case at bar, the Illinois Appellate Court applied two of its prior decisions' discussions of the proper probable cause standard. *People v. Sequoia Books, Inc.*, 150 Ill. App. 3d 211, 501 N.E. 2d 856 (2nd Dist. 1986). In *People v. Patroff*, 141 Ill. App. 3d 483, 490 N.E.2d 148 (2nd Dist. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 251 (1987), *U.S. appeal filed*, decided two months before *P.J. Video*, the appellate court utilized a "common sense and . . . practical consideration test" identical to the "practical, common-sense" standard of *Gates* and *P.J. Video*. 141 Ill. App. 3d at 487, 490 N.E.2d at 151; 462 U.S. at 238; 106 S.Ct. at 1615. In *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987), the appellate court cited *P.J. Video* for the probability and "totality of the circumstances" standard. 145 Ill. App. 3d at ____, 495 N.E.2d at 1296. Thus, since the Illinois Appellate Court applied the same probable cause standard in this case as this Court requires under *P.J. Video*, granting certiorari in this case would only serve to rehash the principles of *P.J. Video* and to review alleged errors in this cause alone. Therefore, certiorari should be denied.

Petitioner is barred from making its prior restraint argument before this Court because Petitioner did not make that argument on appeal below. *Street v. New York*, 394 U.S. 575 (1969), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987). In *Rotary Club* this Court stated that

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 1891-1892, 68 L.Ed.2d 392 (1981).

107 S.Ct. at 1948. In the case at bar, Petitioner did not argue on appeal, and the Illinois Appeliate Court did not discuss, prior restraint or judicial hearings prior to seizure. Therefore, Petitioner cannot bring this argument before this Court.

If Petitioner had made its prior restraint argument on appeal, reason to grant certiorari would still be lacking because this Court in *P.J. Video* reaffirmed speech-related prior restraint principles that have been clearly and conclusively established by a long line of cases and that are dispositive of Petitioner's claim. 106 S.Ct. at 1614, 1615. *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483 (1973). In *Helier*, this Court distinguished the situation in which

> . . . the seizure of large quantities of books [is] for the sole purpose of their destruction, . . . this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required . . . *Quantity of Copies of Books v. Kansas, supra*, 378 U.S., at 213, 84 S.Ct., at 1727 (1964).

413 U.S. at 491. However, this Court also stated that

> But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding . . .

413 U.S. at 492. In the case at bar the situation is one of preservation of evidence and not one of destruction or blocking distribution because "the officers took only one copy of any single magazine." *People v. Sequoia Books, Inc.*, 150 Ill. App. 3d 211 at ____, 501 N.E.2d 856 at 857 (2nd Dist. 1986). Petitioner argues at page 7 of his petition that an evidence-gathering claim is not possible because only three out of 139 magazines seized were the subject of trial. However, Petitioner misstates the record. The jury found each of the 139 magazines to be obscene. *People v. Sequoia Books, Inc.*, 150 Ill. App. 3d 211, at ____, 501 N.E.2d 856, at 858 (2nd Dist. 1986). Thus, since the prior restraint principles of the above-mentioned line of cases are directly and conclusively dispositive of this issue in this case, this Court should deny certiorari. Indeed, certiorari would serve only to rehash the principles reaffirmed in *P.J. Video* and to correct alleged errors in the instant case alone.

Petitioner's general warrant claim is equally unworthy of review by this Court. Beginning with *Marron v. United States*, 275 U.S. 192 (1927) this Court established in a long line of cases a definitive rule for dealing with the general warrant issue. *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Stanford v. Texas*, 379 U.S. 476 (1965); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Maryland v. Macon*, 472 U.S. 463 (1985). These several decisions show that this Court's general warrants rule requires that the warrant leave no discretion to the officer to choose which items should or should not be seized.

In *Lo-Ji Sales* this Court stated

> the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action.

442 U.S. at 325.

In *Stanford* this Court stated the often-quoted proposition that

> In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. See *Marcus v. Search Warrant*, 367 U.S. 717; *A Quantity of Books v. Kansas*, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.

379 U.S. at 485.

The *Stanford* Court quoted the *Marron* opinion

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

275 U.S. at 196, 379 U.S. at 485. And in *Marcus* the Court stated

> The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene . . . publications."

367 U.S. at 732.

In short, the well-settled rule reinforced in these cases is that a warrant is not general if the searching officers

are left no discretion to choose which items should or should not be seized. In the instant case, the officers were left no discretion by the warrant. The warrant stated that the officers should seize magazines containing depictions of specifically described sexual acts which the judge had determined to be obscene under the guidance of this Court's determination that such acts are examples of obscenity. *Miller v. California*, 413 U.S. 15 at 25 (1973). The officers could not seize magazines that did not contain those acts. Simply put, the officers had to act as the warrant directed. Thus, this Court's well-established rule regarding general warrants is completely dispositive of this issue and, therefore, there is no reason for this Court to grant certiorari to hear this claim. A grant of certiorari on this issue would needlessly repeat this time-tested rule while serving only to review the alleged errors in this case alone. Therefore, this Court should refuse to hear this claim.

Clearly, petitioner's allegations raise concerns extensively dealt with by this Court. Review of this cause would not contribute to the development of the relevant areas of law in any new or significant way. Thus, it is clear that the petition does no more than seek intervention by this Court to correct alleged errors in this cause alone. Therefore, certiorari should be denied.

B. There Is No Conflict Between The First And Ninth Circuits And The Illinois Appellate Court.

Petitioner's claim that there is conflict between the First and Ninth Circuits and the Illinois Appellate Court does not withstand scrutiny.

In regards to Petitioner's probable cause and prior restraint arguments, there is no conflict between the courts. First, the two Federal Circuit Court of Appeals cases that Petitioner cites were decided before this Court's decision in *New York v. P.J. Video, Inc.*, ____ U.S. ____, 106 S.Ct.

1610 (1986), and, therefore, those decisions cannot be used as representative of the First and Ninth Circuits' positions on the subjects of probable cause and prior restraint relating to obscenity cases. Second, the two cases cited by Petitioner cannot be read as contrary to the principles set out in *P.J. Video*. Third, both circuits have cited and applied *P.J. Video*. *United States v. Diamond*, 808 F.2d 922 (1st Dist. 1987). This decision has been withdrawn pending rehearing en banc. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987); *United States v. McQuisten*, 795 F.2d 858 (9th Cir. 1986); *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986), *U.S. appeal filed*. Thus, since the First and Ninth Circuits have cited and applied *P.J. Video* and have not ruled contrary to *P.J. Video* and since the Illinois Appellate Court has cited and applied *P.J. Video* in *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987), Petitioner is in error when he claims that the courts disagree on the principles discussed in *P.J. Video*.

Also, there is no conflict between the courts regarding the general warrant issue. First, the First and Ninth Circuit cases cited by Petitioner cite and apply cases from the above-discussed line of cases that sets forth this Court's well-established general warrant rule. *United States v. Guarino*, 729 F.2d 864, 866-868 (1st Cir. 1984); *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). Second, both circuits have recently cited and applied the relevant principles from cases out of the above-discussed line. *E.g.*, *United States v. Guarino*, 729 F.2d 864, 866-868 (1st Cir. 1984); *United States v. Hale*, 784 F.2d 1465, 1469 (9th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 110 (1987). Third, the Illinois Appellate Court has recently cited and applied the relevant principles from cases out of the above-discussed line. *E.g.*, *People v. Sequoia Books*,

Inc., 145 Ill. App. 3d 1054, ____, 495 N.E.2d 1292, 1297 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987). Thus, since the First and Ninth Circuits and the Illinois Appellate Court each cite and apply the relevant principles from cases out of the above-discussed line, Petitioner is in error when he claims that the courts disagree on the general warrant rule.

In short, there is no conflict between the Illinois interpretation and the First and Ninth Circuits' interpretations of this Court's decisions and, therefore, the petition should be denied.

CONCLUSION

Because petitioner has not presented a federal question worthy of plenary review by this Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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